UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the matter of

K-VA-T FOOD STORES, INC.
D/B/A FOOD CITY

and **Case 9-CA-46125**
9-CA-46126
9-CA-46127
RETAIL, WHOLESALE & DEPARTMENT STORE UNION, UFCW, CLC **9-CA-46152**
9-CA-46153

BRIEF OF K-VA-T FOOD STORES, INC. D/B/A FOOD CITY IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. Introduction

This case involves Food City's right as an employer to operate its business in accordance with its established lawful company policies. The law is clear that, even in the presence of union organizing activity, an employer nevertheless has the right to run its business, so long as its actions are not motivated by antiunion animus. Moreover, the Board may not substitute its business judgment for the employer's. But, that is exactly what the ALJ did here.

In this case, Food City terminated two employees for clear, undenied violations of company policy, and laid off one other employee who had been temporarily working one day a month. Food City had legitimate business reasons for taking these actions. The ALJ determined that Food City's actions were motivated by antiunion animus, and therefore violated §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("the Act"). The evidence of record shows, however, that Food City was not even aware that the alleged discriminatees were involved in protected activity and, thus, even if it was, it did not have any antiunion animus. Moreover, Food City has introduced more than sufficient evidence that it would have taken the same actions

against the alleged discriminatees even in the absence of their protected conduct. Accordingly, Food City excepts to the ALJ's determinations that it committed violations of Sections 8(a)(1) or 8(a)(3) of the Act.

II. Statement of the Case

Food City is a privately held family and employee-owned grocery store chain with stores in Kentucky, Virginia, and Tennessee. The company has grown steadily by expansion into new areas, filling in gaps in the trade area with new units, remodeling, and replacing current units to stay on the cutting edge of grocery technology, product selection, and consumer demand. *See* www.foodcity.com.

This matter involves the Louisa, Kentucky store[1] which employs approximately 90 employees. (Tr. 571). Adam Baldridge is the store manager.[2] (Tr. 488). Kevin Garrett is the assistant store manager. (Tr. 71). Jamie Vaughn is a district manager, and his job responsibilities include supervision of the Louisa store, among others.[3] (Tr. 773). John Cecil is the division manager, and his job responsibilities include supervision of the Louisa store, but also stores located in a much broader geographical region.[4] (Tr. 774). Debbie Chapman, the Grocery Supervisor, is responsible for several stores, but is responsible for the grocery department at the Louisa store. (Tr. 695-96).

A. The problem of shrink

Grocery retailing is a high volume low profit business. One of the main issues confronting the industry is inventory shrinkage. "Shrink," as it is commonly referred to, is loss

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[1] The store's hours are Monday through Saturday, six to midnight, and on Sunday, eight to midnight. (Tr. 489).

[2] Mr. Baldridge has been the store manager since 2006, and previously worked as an assistant store manager at another Food City store location. (Tr. 487-88).

[3] Mr. Vaughn is responsible for 11 stores in his district: Louisa, Paintsville, Prestonsburg, Pikeville, Whitesburg, Hazard, Vanzant, Williamson, South Williamson. (Tr. 773, 812).

[4] Mr. Cecil is in charge of the Tri-Cities division, which encompasses the Louisa store. His territory encompasses an area from Greenville, TN to Lynchburg, VA, to Louisa, KY. (Tr. 847).

resulting from purchased product which ultimately leaves the store without being sold. (Tr. 851). Primary causes of shrink include employee theft, shoplifting, vendor fraud, spoilage, and damage. (Tr. 856-57, 873-75).

Food City takes shrink very seriously. (Tr. 852). Because of the industry's low profit margins, shrink loss can easily consume the entire profit potential of any grocery store. (Tr. 852). Therefore, shrink is a high profile topic within the grocery industry generally and is obviously a critical area upon which Food City focuses much effort. (Tr. 852). Food City employs a number of initiatives to track and control shrink. (Resp. Ex. 3). Critical among this is monitoring the back door of each store. Monitoring the back door of a store is accomplished by video monitoring (closed circuit television, or "CCTV"), alarm systems, and assigning responsible employees to control and secure those locations. (Resp. Ex. 28). Other measures include inspecting trash before it is disposed of and using clear trash bags which reduce the opportunity to conceal merchandise and aid inspection efforts. (Resp. Ex. 28). Physical inventories are also conducted on a regular basis.

Thus, at Food City stores, the receiver position is one of the most critical job assignments. (Tr. 856). The receiver is responsible for monitoring the "back door," which is the entrance/exit reserved for vendors. (Tr. 611). The back door is the most prevalent way for employees or vendors to introduce unauthorized products into or allow unsold product to leave the store. (Tr. 856-57). It is equipped with an alarm, and the door must remain closed, except that it can be opened to receive vendors. (Tr. 586). Only those certified to perform back door duties have a security code allowing them to open the door without setting off the alarm. (Tr. 81). Each day, the store manager is provided with a report detailing when the alarm was disengaged/re-engaged for the previous day, and he or she must reconcile the reasons for the

disengagement/re-engagement of the alarm with legitimate business reasons, such as vendor delivery. (Tr. 416-17, 586).

In June 2010, the Louisa store was identified as a high priority shrink location by Food City, which means that its shrink numbers were higher than the company-wide average.[5] (Tr. 798, 814). The company average is about .75%, and, at that time, the Louisa store was averaging well over that, 1.3% or 1.4%. (Resp. Ex. 19; Tr. 853-54). Unfortunately, the problem worsened significantly during the year. (Tr. 855). Thus, various specific initiatives were taken at that store to reduce shrink. (Tr. 855). For example, Food City assigned a specific corporate security employee to monitor the store's shrink, and formed a committee comprised of local employees to analyze preventative measures that could be taken. (Tr. 854). Shrink committee team members included an assistant manager, the grocery manager, the dairy manager, and the receiver and scan deputy. (Resp. Ex. 3). The duties of the team included monitoring and reducing the amount of mark-downs and throwaways, checking that the rotation of merchandise is being performed per company policy, ensuring that price changes were being completed, reviewing existing company policies, and randomly auditing items. (*Id.*) Various managers increased their presence at the store, partly due to the high shrink problem. In addition, Mr. Vaughn provided weekly shrink reports, and discussed these reports with store management. (Tr. 798).

B. Food City's legitimate business reasons for discipline and discharge, or layoff

1. Ruth Ann Kirk

Ruth Ann Kirk was employed by Food City from January 2001 to October 2010 when she was laid off. (Tr. 63). She worked in numerous positions within the store, last as a back-up scanning deputy. (Tr. 66). She was also trained in back door receiving (Tr. 66) and understood that "[e]mployees could not enter that way or exit that way."

[5] Ms. Burton testified that she knew that Food City was having a problem with shrink. (Tr. 445).

She had transitioned from scanning deputy to back-up scanning deputy late in 2009. (Tr. 66). At that time, she had voluntarily left her full-time employment with Food City and accepted a position working full-time for the Lawrence County, Kentucky Extension Office. (Tr. 506). When she accepted this position, she and Mr. Baldridge had a conversation about her resignation. (Tr. 506-07). Mr. Baldridge gave her an opportunity to take a week's vacation and "try out" her new job, which she accepted. (Tr. 72). After a week in her new job, Ms. Kirk returned to the store and told Mr. Baldridge that she had decided to keep it. (Tr. 72). He told her that he was not sure what he was going to do, "because that would leave him short-handed." (Tr. 72). She agreed to work on a temporary basis, and train the new scanning deputy, Tommy Bush.[6] (Tr. 628-29). After a few months of working on weekends, she asked Mr. Baldridge for a more limited schedule -- only one day per month. (Tr. 74).[7] Mr. Baldridge and Ms. Kirk agreed the arrangement was to be a temporary solution and she would be laid off when a backup was selected to be trained. (Tr. 519, 622, 628-31). Ms. Kirk consistently testified that she was not "for sure" how long" her help would be needed. (Tr. 123).

A scanning deputy is one of the most important shrink positions, as this employee is responsible for ensuring that product prices are correctly marked and are correct in the front-end register system. As the name implies, the back-up scanning deputy provides "back-up," or additional support, for the scanning deputy during the monthly price change and at other times, such as when the scanning deputy takes time off.[8] (Tr. 512-13). Ms. Kirk's job duties were limited -- essentially, during the monthly price change, she, along with the scanning deputy, changed the prices to correspond with the new Sunday advertisement. (Tr. 64). Because Ms.

[6] Mr. Bush was moved out of this position. Martha Smith subsequently received the position. (Tr. 148).
[7] From January until October 2010, Ms. Kirk only worked one day a month. (Tr. 124).
[8] Ms. Kirk served as the full-time scanning deputy for three years. (Tr. 119). She testified that she needed help during the once-a-month price change, as well as at other times. (Tr. 121).

Kirk only worked one day per month, other store employees would frequently be required to provide back-up support.[9] (Tr. 514, 627).

As agreed, Food City laid off Ms. Kirk on October 16, 2010, because it had chosen a new back-up scanning deputy who was available to work the hours required by the position. When the scanning deputy was not scheduled to work, needed time off, or requested additional help, various employees filled in. It was inadequate. Martha Smith, the scanning deputy at the time, requested a "true" back-up scanning deputy (Tr. 228) and recommended that another associate, Lee Maggard, who had been assisting her already, be selected.[10] (Tr. 229). Mr. Baldridge accepted Ms. Smith's recommendation. (Tr. 516). As Ms. Kirk's position was always temporary in nature, Mr. Baldridge informed Ms. Kirk that her temporary position had ended, which was no surprise to her.[11] (Tr. 518). Mr. Baldridge testified that Ms. Kirk agreed that her job was temporary, and appeared fine with the decision. (Tr. 519).

Ms. Kirk returned to the store the following Monday, however, to complain about her layoff. (Tr. 521). At her request, Mr. Baldridge prepared a document that stated that she had not done "anything wrong." (Tr. 110; GC Ex. 3). At this time, she informed Mr. Baldridge that he should not be "letting go of the part-time employees with the Union trying to come in." (Tr. 112). She testified that Mr. Baldridge responded "it had nothing to do with the Union." (Tr. 112). Ms. Kirk said, "I could help you vote against this Union." (Tr. 521).

2. Glenda Burton

Glenda Burton worked for Food City from January 2000 to November 2010. (Tr. 342). At the time of her discharge, Ms. Burton was the receiver (Tr. 342), a critical job in maintaining

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[9] Kevin Garrett and Joe Cantrell frequently provided backup support. (Tr. 514, 627).

[10] Ms. Smith testified that Mr. Baldridge told her he was "going to get me somebody to be more dependable." (Tr. 180).

[11] Mr. Baldridge is not aware of any other employee at Food City who is permitted to work only one day per month. (Tr. 522).

the integrity of the store. To be a receiver, the associate must be qualified, trained, and certified.[12] A receiver has many critical job duties, which include: (1) checking vendors into the receiving area[13]; (2) scanning all product brought into the store; (3) discovering and refusing unauthorized items delivered to the store; (4) controlling all traffic in and out of the rear area of the store and restricting all unauthorized personnel; (5) requiring vendors to sign and/or fill out appropriate paperwork; and (6) making sure all vendors are aware of the rules, procedures, and methods they must follow when delivering product to the store. (Resp. Ex. 1).

Additional receiver job duties include policing the receiving area.[14] (Resp. Ex. 1). A receiver has the responsibility to ensure that all exits in the receiving area are closed and secured at all times, in accordance with company procedures, when not being used for receiving functions.[15] (Tr. 416). Ms. Burton testified that she understood this was her responsibility. (Tr. 350). The receiver has the authority to refuse unauthorized merchandise and/or persons, including all associates, entry to, or exit from, the back room. (Resp. Ex. 1). Personal items are not permitted to enter through the back door. (Tr. 796).

Receivers, because the vendors only come during a portion of the shift, have time for other duties. In some stores they also "work warehouse cakes," which means ensuring that expired cakes are removed, and that reduction in the price of cakes are posted for cakes that are approaching their expiration dates. If this task is not performed correctly, it results in a 100% loss to Food City as the product has to be thrown away or given to charity. (Tr. 551). At the

[12] Mr. Baldridge testified that Ms. Burton passed a receiver certification test which covers the rules and regulations of the back door. (Tr. 591-92) (Resp. Ex. 30).

[13] Ms. Burton testified that to check a vendor in the following steps are followed: a vendor signs in, brings their product in, and she checks them in. She scans the product with a gun, and ensures that the invoices match. The vendor then places the product on the shelf. She then verifies that the vendor does not have any product left in their trays, and the vendor signs out. (Tr. 344-45).

[14] The receiver may allow employees to exit the receiving door to take out the trash. The receiver is not, however, permitted to allow employees to exit the receiving door to visit with friends. (Tr. 688-89).

[15] Ms. Smith testified that it is company policy that the receiving door remain closed when not in use. (Tr. 233).

Louisa store, this task became part of the receiver's duties in approximately November 2010, but it is common company-wide for a receiver to have such additional duties.[16] (Tr. 551-52, 831). Mr. Baldridge and Kevin Garrett, the Assistant Store Manager, had previously worked warehouse cakes but, after witnessing this, Mr. Vaughn instructed Mr. Baldridge to assign the work to an employee because he felt store management should be focusing on their managerial duties.[17] (Tr. 551-52, 786-77). Mr. Baldridge and Mr. Garrett determined that the receiver was the best employee to handle this task.[18] (Tr. 553, 787). Mr. Baldridge, along with Mr. Garrett, informed Ms. Burton of this additional job duty, and she replied, "okay, that's fine." (Tr. 378). Ms. Burton had previously performed this duty as a receiver for over a year, and was well aware of its requirements. (Tr. 379-80). At no time did she tell Mr. Baldridge, or anyone in management, that she did not have time to perform this duty. (Tr. 555).

Prior to her discharge, Ms. Burton received discipline on several occasions. On October 23, 2010, Mr. Garrett, the assistant store manager, issued a verbal correction to Ms. Burton because she had violated company policy. (GC Ex. 10(a)). Ms. Smith admitted the violation because, as she testified, every employee was required to clock out for break. (Tr. 232). Mr. Garrett witnessed Ms. Burton in the break room talking to other employees while on the clock. (Tr. 722). He speculated that she may have been off the clock because she had just returned from lunch. (Tr. 722). He went to her work area and, when he questioned her about it, she admitted that she was on the clock while in the break room. (Tr. 372). He counseled her that being in the break room while on the clock was a violation of company policy. (Tr. 722). Then

[16] For example, the receiver works warehouse cakes at the Williamson, Kentucky store. (Tr. 716). Three stores in Mr. Vaughn's district assigns warehouse cakes to the receiver. (Tr. 831).

[17] The assistant manager is responsible for ensuring that the warehouse cakes get completed. They are authorized to assign this task to employees. (GC Ex. 21; Tr. 833).

[18] Mr. Baldridge testified that if done correctly, it would take approximately 30-60 minutes a day to do cakes. (Tr. 554).

Jamie Vaughn saw Ms. Burton in the break room, approximately ten minutes after her conversation with Mr. Garrett. (Tr. 777). Because she acted "surprised," Mr. Vaughn suspected she had not clocked out and requested that Mr. Garrett check to see if she had clocked out on break. (Tr. 817). She had not. (Tr. 778). Because she had violated company policy, been verbally warned, and then disregarded Mr. Garrett's directive, she received a verbal correction. (Tr. 723). Ms. Burton asked Mr. Garrett whether he would have given her a correction if Mr. Vaughn had not seen her, and he replied that he would have. (Tr. 724). The following day, two more employees, Richard Branham and Daryle Sweeney, violated company policy. (Tr. 726). They were also disciplined. (Tr. 632, 747-48; GC Exs. 9(g) and 9(h)).

Because other employees, in addition to Ms. Burton, had recently violated the same company policy, Mr. Baldridge and Mr. Garrett drafted and posted a notice reminding employees about the company's policy concerning breaks and being away from work areas.[19] (GC Ex. 4; Tr. 527, 730). Mr. Baldridge testified that these notices are still posted. (Tr. 531, 635).

Ms. Burton was again disciplined a few weeks later. On November 4, 2010, she received a verbal correction notice because she arrived late to her scheduled shift.[20] (GC Ex. 16). While Ms. Burton claimed she did not recall receiving the verbal correction notice, she conceded that she had been late. (Tr. 398).

Then, on November 12, 2010, Mr. Baldridge issued Ms. Burton a written correction for insubordination. (GC Ex. 10(b)). Debbie Chapman, the Grocery Supervisor, discovered that Ms. Burton had scanned unauthorized product – orange cupcakes -- into the store.[21] (Tr. 699-700). Ms. Chapman, while performing her weekly store visit, observed the receiving area and

[19] Mr. Baldridge testified that the posting of the notice was unrelated to the union organizing drive. (Tr. 530).
[20] Mr. Baldridge testified that Mr. Garrett informed him of this discipline when it occurred. (Tr. 533).
[21] Ms. Burton claimed that "someone" had told her to scan in an unauthorized product using the UPC code of an authorized product. She was unable to recall who that person was. (Tr. 393-94). Ms. Chapman, however, testified that she had never told Ms. Burton to do so, and she had never heard of anyone doing this. (Tr. 712).

watched Ms. Burton check in the Hostess vendor. (Tr. 699). Upon inquiry, Ms. Burton told her that she was checking in the orange cupcakes – which were unauthorized -- but that she let them in because "they sell good." (Tr. 699).

This was a clear and admitted violation of important company policy. To obtain authorization for a product, a vendor must contact Food City's corporate office. (Tr. 698). Once authorized, each product (including each flavor) has a UPC code assigned to it which allows Food City to track and monitor the product, its sales, its pricing, and any recalls. (Tr. 698, 700, 780-81). The UPC code is programmed into a "gun" that the receiver uses to scan product into the store. (Tr. 698). If the product is unauthorized, the gun beeps and indicates to the receiver not to allow the product into the store. To override this system, the receiver can, but is not supposed to, scan another product's UPC code. (Tr. 698).

Food City uses planograms, essentially plans (or layouts) that assign very specific spaces on a store's shelves for authorized merchandise to be placed. The planograms are designed for the most effective sales placement of authorized products and do not work as designed if unauthorized products are allowed into the store and placed on the shelves. (Tr. 700, 780). Here, chocolate cupcakes were authorized, while orange cupcakes were not. Moreover, Food City had no way of tracking and monitoring the sale of unauthorized product.[22] Ms. Chapman explained to Ms. Burton that such product was not permitted in the store, instructed her to reject it, and further explained how the vendor could obtain authorization from corporate headquarters. (Tr. 699, 701, 820-21).

A few days later, Ms. Chapman, upon reviewing her store visit notes, called Mr. Baldridge to ensure that Ms. Burton had followed her directive to reject the unauthorized

[22] Ms. Burton testified that she understood how important it is for the company to have the right product in the right location, and that the company spends a time studying its market, and that it is important for its sales and its success. (Tr. 433).

product. (Tr. 701). He looked and found Ms. Burton had not. (Tr. 534). He removed the unauthorized product from the shelves, corrected the display according to the planogram, and gave it to Ms. Burton to require the vendor to remove them from the store. (Tr. 535). After conferring with Mr. Vaughn, Mr. Baldridge prepared and issued a written correction to Ms. Burton. (Tr. 537, 702, 779).

Because the violation involved insubordination, a dischargeable offense, Mr. Vaughn attended the disciplinary meeting, along with Mr. Baldridge and Ms. Chapman. (Tr. 779, 784). Mr. Baldridge explained to Ms. Burton why it was important to keep unauthorized product from entering the store. (Tr. 539; GC Ex. 10[23]). Ms. Burton admitted that she knew the orange cupcakes were not authorized and scanned them in as chocolate cupcakes after being directed not to. (Tr. 393, 704, 785). In addition, Ms. Burton admitted that she fully understood the company policy she violated insubordinately: "If it's in the systems and it won't scan in, we're not to take it." (Tr. 431). Because of her serious insubordination, Food City issued a written correction for insubordination (refusing to follow Ms. Chapman's directive) (GC Ex. 10(b)). The correction stated that it was final, and that any further disciplinary actions could result in discharge. *Id.* The ALJ determined that this action was not in violation of the Act.

Despite this warning, on November 19, 2010, Ms. Burton again and indisputably knowingly and intentionally violated several company policies. (GC Ex. 10(c)). Mr. Vaughn observed outdated product, specifically warehouse cakes, on the store's shelves. (Tr. 788). Ms. Burton was responsible for removing outdated cakes and reducing the price of cakes approaching an expiration date. (Tr. 379-80). Despite the fact that Ms. Burton had worked the previous day, and was at work on this day (and had already worked the cake section), she had neither removed

[23] Mr. Baldridge testified that he read aloud the notes contained in GC Ex. 10. (Tr. 541).

the out-of-date cakes nor reduced the price of the nearly out-of-date cakes.[24] (Tr. 788). Mr. Baldridge took the buggy full of cakes back to the receiving area, and instructed Ms. Burton to process them. (Tr. 667).

After dealing with Ms. Burton's failure to perform her job duty, Mr. Vaughn began his store visit, accompanied by Mr. Baldridge. (Tr. 791). Shortly thereafter, the produce supervisor, James Spears, reported to Mr. Baldridge and Mr. Vaughn that he had observed Ruth Ann Kirk, a former employee, parked behind the store near the back door.[25] (Tr. 561, 792). This is a rare and suspicious occurrence, as the back door receiving area is not to be used as an entrance to, or exit from, the store. (Tr. 562). Only vendors are allowed to park in the back. After being seen, Ms. Kirk drove off. (Tr. 142, 561, 668, 788-89).

Based on this report, Mr. Baldridge and Mr. Vaughn reviewed the CCTV feed of the receiving area.[26] (Tr. 563, 794; Resp. Ex. 14). What they learned was very troubling to them. Ms. Burton and Ms. Smith were observed in the receiving area. (Tr. 567, 794). This was suspicious because Ms. Smith was not in her work area, and Ms. Burton was required to prevent her from being there. Both were members of the shrink committee, had been trained as receivers, and were therefore knowledgeable about company policies related to the back door receiving area.

Ms. Burton and Ms. Smith were observed taking soda crates, through the back door, a job responsibility of Ms. Burton's, but not Ms. Smith's. (Tr. 569). The explanation, as Ms. Burton testified, was that she had told Ms. Smith that Ms. Kirk was coming by to drop off Tupperware,

[24] Mr. Vaughn testified that the cakes were up to four days past their expiration date. (Tr. 790). Most did not have a coupon discounting them. (Tr. 791).
[25] Management officials drive around the store routinely to monitor the back of the store. (Tr. 562).
[26] The video system is located in Mr. Baldridge's office. It runs at all times, and records. (Tr. 564).

so "she walked out with me to visit with Ms. Kirk." (Tr. 405).[27] After both employees ceased work and exited the back door, the door remained opened, with the alarm disengaged and the receiving area unmonitored for 8 minutes, all serious violations. (Tr. 795). During this time, there was no sign of either Ms. Burton or Ms. Smith. A vendor came into the receiving area to be checked out according to company policy; however, Ms. Burton was not present to perform her job duties. (Tr. 571-575, 795). After eight months, both women returned, and Ms. Burton was observed carrying a package into the store via the open back door, another serious violation. (Tr. 575-76, 795).

After reviewing the CCTV feed, Mr. Vaughn contacted Joe Fryar, head of corporate security, because he was so concerned about the security breach.[28] (Tr. 798). Mr. Fryar advised Mr. Vaughn to determine what was in the package that was carried into the store, and Mr. Vaughn asked Mr. Baldridge to do so. (Tr. 799-800). Ms. Burton told Mr. Baldridge that she had removed the package from the store and that it contained Tupperware. (Tr. 578). Mr. Baldridge informed Mr. Vaughn of the contents of the package. (Tr. 799).

During the time Mr. Baldridge was absent, Mr. Vaughn had spoken with various members of higher management about the incident. (Tr. 800). Based on the seriousness of the violations of company policy, a group of management officials met to decide what action should be taken. The unanimous consensus of the management officials was to terminate the employment of both Ms. Burton and Ms. Smith. (Tr. 801, 871, 903).[29] Mr. Baldridge prepared the termination notices, and Mr. Vaughn reviewed them. (Tr. 581, 803; GC Ex. 10(c)).

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[27] Ms. Burton testified that she understood that there would have been no problem if Ms. Kirk had entered the store through the front door, dropping off her Tupperware. She conceded that she did not tell her to do this. (Tr. 438).
[28] Mr. Fryar works at the corporate headquarters. (Tr. 799).
[29] Mr. Baldridge was not involved in the decision to terminate Ms. Burton, but agreed with it. (Tr. 801, 871, 872).

Mr. Baldridge then called Ms. Burton to his office for the discipline meeting. (Tr. 581, 802). Mr. Baldridge first asked Ms. Burton about the cakes. (Tr. 583) She conceded she had not removed the out-of-date cakes or couponed the nearly out-of-date cakes, but she understood the rotation and couponing policies. (Tr. 583, 803-804). He then asked her why she had left the receiving area. (Tr. 583, 805). She explained that she had met Ms. Kirk outside for Ms. Kirk to drop off some Tupperware that Ms. Burton had purchased at a party.[30] (Tr. 403, 805). During the time period that Ms. Burton was not in the receiving area, but was somewhere outside of the store, the back door was left open and unsecured, which is a serious violation of company policy. (Tr. 585; Resp. Ex. 1). Ms. Burton did not deny anything. (Tr. 805). As the receiver, Ms. Burton was fully aware that the back door must not remain open and unsecured. It was her responsibility to monitor and police this door, and to prohibit unauthorized associates, such as Ms. Smith, from exiting the store by it. (Tr. 845).

In addition, Ms. Burton left her job while on the clock. Ms. Burton conceded that she was not performing any work while outside after taking out the crates. (Tr. 437). She also conceded this was a much longer period of time than when she stopped in the break room to say hello to co-workers. (Tr. 440). Leaving your job during working hours for any reason without authorization from the store manager is a violation of company policy. (Resp. Ex. 15, p. 20). In addition, a vendor was left waiting in the receiving area until she returned, which is likewise a violation of company policy. (Resp. Ex. 1).[31] When Ms. Burton returned, she was observed carrying a package of unauthorized product into the receiving area, which was another violation

[30] Ms. Kirk testified that she was in a hurry, and did not have time to bring the Tupperware through the front door. (Tr. 139). She conceded that she had never before used the back door to deliver a package. (Tr. 135).
[31] Ms. Smith testified that neither she nor Ms. Burton made any effort to assist the vendor. (Tr. 250).

of company policy.[32] (Resp. Ex. 1). Based on the serious nature of the violations on November 19, the additional independent prior disciplinary actions, including a final warning involving the cakes, Mr. Baldridge, accompanied by Mr. Vaughn, terminated Ms. Burton for violation of company policies. (Tr. 585).

Ms. Burton sometimes claimed that her conduct as receiver was not contrary to policy she was aware of. That claim is refuted by Respondent's Ex. 30, a test Ms. Burton took in November, 2009. Specifically, Ms. Burton's answer to Question No. 6 concluded she knew it was wrong to permit Ms. Smith to use the back door and for her to use it to bring personal items in; her answer to Question No. 19 revealed her understanding that leaving the door open for the entire period of her visit with Ms. Kirk was wrong. To the extent Ms. Burton testified to the contrary, her testimony is not credible.[33]

3. Martha Smith

Ms. Smith was employed at Food City from November 2000 to November 2010. (Tr. 166). At the time of her discharge, Martha Smith was the scanning deputy.[34] (Tr. 167). As noted above, the scanning deputy is a very important position. Ms. Smith was trained to and would fill in and cover the receiving area. (Tr. 173). She had also been designated assistant manager and cashier. (Tr. 167-68).

Like Ms. Burton, Ms. Smith had also been counseled previously. On October 5, 2010, Ms. Smith was absent from a mandatory store meeting for all associates. (Tr. 205, 601). She was given notice of such meeting (Tr. 206, 207, 678), but failed to ask to be excused from the

[32] Ms. Smith conceded that an employee is not authorized to bring things through the back door. (Tr. 252). Mr. Vaughn testified that personal items are only permitted to enter the store through the front door. (Tr. 796).

[33] Ms. Burton's testimony was not credible generally. See her repeatedly conflicting testimony as to what she had said in the discipline meeting about the insubordination incident. (Tr. 434-36; 447-50; 455-57).

[34] While Ms. Smith is also certified to perform back door receiving, at the time of the incident on November 19, she was working in the capacity of a scanning deputy. (Tr. 906).

meeting. (Tr. 602-03). She testified that she was aware that Food City had a policy that if an employee was going to be absent, that employee must call in and give notice (Tr. 243), and that she violated company policy by failing to do so.[35] (Tr. 245). She did call Mr. Baldridge afterwards and said she was purchasing a new car and had forgotten about the meeting. (Tr. 209, 244).[36] She testified that she had informed him that she would be there and that she knew that she was required to give notice if she could not be there, but that she had simply forgotten about the meeting, a conceded violation. (Tr. 245). Mr. Baldridge issued a written correction for her failure to ask for an excuse prior to the meeting.[37] (GC Ex. 7). Ms. Smith testified that Mr. Baldridge told her that if she would have called ahead, he may have excused her from the meeting. (Tr. 245, 602-03). Other employees who missed informed a member of management that they were unable to attend, and their absences were excused. (Tr. 324, 605; Resp. Ex. 32).

On November 21, 2010, Ms. Smith was terminated for violating company policies as a participant in the above incident involving Ms. Burton on November 19, 2010. (Tr. 609). Ms. Smith's termination was discussed by the same group as Ms. Burton's, and the same decision was made[38]. (Tr. 801, 907).

A meeting to discuss her termination occurred a few days later, as she had completed her shift on the 19th when it was time to meet with her. (Tr. 609, 806). Mr. Vaughn, Mr. Baldridge and Ms. Smith attended this meeting. (Tr. 684, 807). During this meeting, Mr. Baldridge

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[35] Mr. Baldridge testified that this policy is referred to as a "no call/no show." (Tr. 603).

[36] Ms. Smith conceded that she could have called from the car dealership, but she simply forgot about the meeting. (Tr. 244).

[37] Ms. Smith testified that she wrote the following comment on the bottom of the page: "I don't agree with this totally, and this is my first one in 10 yrs, and I believe I wouldn't have got it now if it wasn't for this union shit." (GC Ex. 7). Mr. Baldridge told her that it was inappropriate due to the word "shit" and that he would not send it to corporate. (Tr. 615). He cut off the bottom of the page containing the profane language, and sent it in. (Tr. 615). He assumed what she meant by the comment was that she was sick of the union activity (Tr. 616-17) and could not tell from the comment whether she was for or against the Union. (Tr. 617).

[38] Mr. Baldridge was not involved in the meeting where the decision to terminate Ms. Smith occurred, but agreed with it. (Tr. 801, 871, 872).

explained the seriousness of the November 19 violations of company policy. (Tr. 610). Like Ms. Burton, Ms. Smith did not deny violating company policy. (Tr. 807). Specifically, Ms. Smith was discharged for being outside of her work area while on the clock as she was observed exiting the back door for approximately 8 minutes, which she admitted (Tr. 248). She also admitted that she was not performing any work while on the clock. (Tr. 249). As a member of the shrink committee and a trained receiver, Ms. Smith was fully aware of the seriousness of her violations. No employee in the Louisa store has committed similar violations of company policies as Ms. Burton and Ms. Smith. (Tr. 873).

C. Food City had no knowledge of the alleged discriminatees' involvement in the union organizing drive

Food City learned of the organizing drive in September 2010, when several employees approached various members of management complaining that union organizers were conducting home visits trying to persuade them to join or form a union.[39] These employees relayed that the union organizers were impolite and unwelcome.[40] In response, Food City held several meetings to explain the law and its position to employees.[41] Managers were on-site to provide answers to any questions employees had. (Tr. 848).[42]

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[39] Mr. Baldridge testified that Kevin Garrett called him while he was on vacation and stated that Lequitte Perry, the produce manager, had been told that some of the employees had been visited at home by union organizers. (Tr. 493). Mr. Baldridge then relayed this information to his supervisor, Mr. Vaughn. (Tr. 494). Mr. Vaughn told him to enjoy the rest of his vacation. (Tr. 495).

[40] Ken Burns testified that the home visits started in August 2010. (Tr. 48).

[41] There is no allegation that the company-led meetings violated the Act.

[42] After one of these meetings, Martha Smith asked Mr. Cecil several questions about wages at other grocery chains, such as Kroger. (Tr. 849). He discussed with her that Food City pays excellent wages which he believed were competitive with other grocery stores in the area. (Tr. 850). She testified that he answered all of her questions, and she did not believe he was upset with her for asking these questions. (Tr. 238). Mr. Cecil testified that he had no reaction to this question, and it was the type of question he would expect to be asked of him. (Tr. 851). Ms. Burton testified that Mr. Cecil did not appear upset or troubled by the questions, nor did he tell Ms. Smith not to ask any other questions. (Tr. 421).

Food City was not aware that any of the three alleged discriminatees were involved in the union organizing drive. Ms. Kirk admitted that she had been secretive about her involvement. (Tr. 127). She testified that she signed a union card while employed with the Lawrence County Extension Office, (Tr. 95), and not while employed with Food City. Ms. Kirk conceded that she had already been laid off when she attended any meetings related to the union. (Tr. 128). She admitted that the union had not conducted any open meetings, or passed out any literature at the store. (Tr. 130). Ms. Kirk also testified that she spoke with Mr. Baldridge generally about the union, but it was in the summer, or early fall of 2009, before she resigned her full-time employment. (Tr. 102). Mr. Baldridge and Mr. Vaughn both testified that they were not aware that Ms. Kirk was involved with any union activity. (Tr. 497, 520, 811).

Ms. Burton testified that, sometime in 2009, she was called to meet with Mr. Baldridge concerning unions.[43] (Tr. 360). Mr. Baldridge and Cheryl Gowen, who was serving as a witness, both testified to the contrary and asserted that there was no discussion of the union. (Tr. 491-92, 692). After learning from a few of the associates that Ms. Burton was expressing dissatisfaction with her job, Mr. Baldridge decided to call her in and ask her whether she was happy with her job, to which she replied that she was. (Tr. 490, 492). Ms. Burton admitted that no one in management knew that she had signed a union card. (Tr. 419). She likewise admitted that no one in management knew that she had meetings with the union at local restaurants or at employees' homes, or that she had delivered a list of names and addresses to the union. (Tr. 419-20). Mr. Baldridge and Mr. Vaughn both testified that they did not have any reason to believe that Ms. Burton had any relationship to the Union or to the organizing drive. (Tr. 601, 808).

[43] Ms. Kirk and Ms. Smith testified that Ms. Burton told them that this meeting was about the union, but that Ms. Burton did not want to discuss any details. This is hearsay evidence, and is inadmissible. (Tr. 103, 184).

Ms. Smith testified that she had not told anyone in management that she signed a union card (Tr. 236) or that she gave Daniel Cole a DVD concerning the union, or that management knew that she was attending union meetings at employees' homes. (Tr. 237). Mr. Baldridge and Mr. Vaughn testified that they did not have any knowledge that Ms. Smith was involved in any sort of organizing drive, or had any relationship with the Union. (Tr. 601, 808).

Ken Burns, the union organizer, testified that he did not inform anyone in management that an organizing drive was occurring. (Tr. 482-83). He conceded that there is a policy of maintaining the confidence or secrecy of the individuals who signed authorization cards. (Tr. 483-84).

Several union meetings were held at the home of one of Food City's employees, Melissa Holley, who is still employed at Food City. (Tr. 49, 51). Ms. Holley testified that she did not tell anyone that she was involved in the union. (Tr. 328).

III. Argument

A. The alleged discriminatees have settled their claims with Food City and are not entitled to any additional relief

1. The private agreements should be given their full effect

The ALJ devotes ***one paragraph*** of his 39 page decision to dismissing Food City's argument that the alleged discriminatees have settled their claims with Food City and are not entitled to any additional relief. (Resp. Exs. 23, 24, 25). He ignored well-settled Board law. According to the Board, "the validity of . . . waiver and release agreements executed by the Respondent and alleged discriminatees should be governed by the same standards as private non-Board settlements under *Independent Stave* . . ." *Hughes Christensen Company*, 317 NLRB 633 (1995).

In *Independent Stave*, 287 NLRB 740, 741 (1987), the Board recited its long history of encouraging settlements. It then listed the following factors to guide its determination as to whether to give effect to a non-Board settlement: (1) whether the charging parties, the respondents, and any of the individual discriminatees have agreed to be bound, and the General Counsel's position regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes. *Id.* at 743.

In this case, the ALJ first summarily states that he rejects Food City's claim that the agreements bar the alleged discriminatees from obtaining relief. He ignores the cases cited by Food City and cites one case which does not even support his rejection of Food City's argument. *See Weldun International*, 321 NLRB 733, 734 n. 6 (1996), *enfd. in relevant part*, 165 F.3d 28 (6th Cir. 1998) (Table).

The ALJ then goes on to address ***only one*** of the *Independent Stave* factors, stating that "[n]either the Union nor the General Counsel approved the agreements and both now oppose giving effect to them outside of a compliance proceeding." (ALJ Decision, p. 35). This one factor is far from dispositive. The ALJ completely ignores the other three factors.

In *American Pacific Concrete Pipe Company, Inc.*, 290 NLRB 623 (1988), the Board overturned a similarly deficient ALJ ruling. In that case, the Board held that the ALJ had incorrectly ruled that a discriminatee was entitled to additional back pay award because the General Counsel had not approved the settlement. The Board went on to state that there are several other factors that must be considered, including:

> whether the charging party, the respondent, and the discriminatee had agreed to be bound, and the General Counsel's position regarding the settlement; whether the settlement was reasonable in light of the alleged violation, the risks of litigating the issue, and the stage of litigation; whether fraud, coercion, or duress were present; and whether the respondent has a history of violations or had breached previous settlement agreements.

Id. at 623.

Likewise, in *Hughes Christensen Company*, 317 NLRB 633 (1995), the Board overturned the ALJ's decision refusing to uphold waiver and release agreements. According to the Board, "[t]he judge reasoned that to permit waiver and release agreements to bar employees' unfair labor practice claims would destroy the efficacy of the Act." The Board disagreed and found that the waiver and release agreements signed by the alleged discriminatees in that case barred any further relief. *Id.* at 634.

In the present case, the ALJ did not even address all of the *Independent Stave* factors. If he had, he would have necessarily determined that the settlement agreements in this case satisfy the *Independent Stave* standard. The agreements are perfectly reasonable and each of the alleged discriminatees entered into them willingly. There is no contention that the agreements were fraudulently procured, or that there was any duress or coercion involved. For example, Ms. Kirk testified that she understood, read, and signed the settlement agreement. (Tr. 143-44). Ms. Smith likewise testified that the settlement agreement was explained to her and she read and understood the agreement before she signed it. (Tr. 222). Finally, Ms. Burton testified she understood the settlement agreement and signed it "voluntarily and of [her] own free will." (Tr. 410-411). All waived any rights they may have to reinstatement. (Resp. Exs. 23, 24, 25). And, Food City does not have a history of violating the Act, nor has it breached settlement agreements

in the past. Therefore, as in the cases cited above, the private settlement agreements in this case should be given their full effect.

2. The private agreements operate as an accord in satisfaction as to any relief available

The ALJ completely ignores Food City's argument that, even if the agreements are not given their full effect, they nevertheless operate as an accord and satisfaction as to any relief available to the alleged discriminatees. *See Keppard v. International Harvester Co.*, 581 F.2d 764 (9th Cir. 1978). In that case, the Court held that an employee's acceptance of a monetary payment from his employer regarding a grievance operates as an accord and satisfaction, preventing him from further economic recovery in the matter. The same rule applies in discharge situations. *See, e.g., American Pacific Concrete Pipe Company, Inc.*, 290 NLRB 623 (1988).

In this case, the alleged discriminatees reached private settlements with Food City. All three accepted checks and cashed them. (Tr. 143, 222, 411; Resp. Exs. 23, 24, 25). And, there is no evidence of any "fraud, coercion, or duress" factoring into those settlements. Although, as the ALJ points out, the General Counsel may not have approved of the settlements, they nevertheless operate as an accord and satisfaction barring the alleged discriminatees from any further relief. Moreover, it should be noted Ms. Burton testified that she is not interested in reinstatement. (Tr. 457-58). Thus, for this additional reason, she has waived any entitlement to such relief.

B. Food City excepts to the ALJ's determination that the General Counsel met its burden of proving that Food City was motivated by union animus

In order to establish a *prima facie* case of discriminatory action, the General Counsel must show that the employee's protected conduct was a motivating factor in an adverse

employment decision. *Wright Line*, 251 NLRB 1083, 1089 (1980). To accomplish this, the General Counsel must demonstrate that (1) the employee engaged in protected concerted activity, (2) the employer was aware of that activity, and (3) the employer had union animus. *Texas Dental Association*, 354 NLRB No. 57, n. 3 (2009) (*citing Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007)); *Desert Springs Hospital Center*, 352 NLRB 112, n. 2 (2008)). Once these three factors are established, the burden shifts to the employer to show that it would have taken the same action even in the absence of protected conduct. *Wright Line*, 251 at 1089. Here, Food City concedes that the alleged discriminatees engaged in protected concerted activity. Food City excepts, however, to the ALJ's findings that Food City was aware of the activity, that it had union animus, and that it would not have taken the same actions even in the absence of protected activity.

1. Food City excepts to the ALJ's finding that Food City was aware of the alleged discriminatees' involvement in the union organizing drive

An employer cannot, of course, be motivated by facts of which it is not aware. *Philips Industries, Inc.*, 295 NLRB 717, 718 (1989). In *Continental Oil Company*, 161 NLRB 1059 (1966), the Board adopted the ALJ's decision that an employer was not guilty of an unfair labor practice in connection with a discharge where it lacked knowledge of the discharged employee's alleged protected activity.

> ***There is no evidence that Toller or any other representative of management was aware of the previous discussion between Bruso and Naeve which led to this meeting.*** The record also reveals that Bruso never suggested to any other employee that he be their spokesman and, similarly, he was never so authorized by any employee. Nor did Bruso ever so indicate to management. And, assuming arrangements for the April meeting were a concerted activity with respect to the cost and maintenance of the uniforms, the fact is that what management found fault with was rather Bruso's personal unwillingness to wear a uniform. . . . [I]f

> Bruso was engaged in protected activities, Respondent was not aware of this fact. . . .

Id. (emphasis added). *See also, Hampton Inn NY-JFK Airport*, 348 NLRB 16, 17 (2006); *BLT Enterprises of Sacramento, Inc.*, 345 NLRB 564, 565-566 (2005), the Board affirmed the ALJ's ruling that an employer did not violate Section 8(a)(3) in discharging five employees where there was no evidence that the employer was aware of any union organizing efforts. And, in *Continental Oil Company*, 161 NLRB 1059 (1966), the Board adopted the ALJ's decision that an employer was not guilty of an unfair labor practice in connection with a discharge where it lacked knowledge of the discharged employee's alleged protected activity. *Id.*

Likewise, in the present case, as in *BLT Enterprises* and *Continental Oil*, there is no evidence that Food City had information that any of the three alleged discriminatees were involved in the union organizing drive. Each of the decision-makers denied any such knowledge. (*See, e.g.*, Tr. 497, *ll* 13-19; 600, *ll.* 13-20; 616, *l.* 7 thru 617, *l.* 7; 808, *ll.* 15-24; 811, *ll.* 4-8). The undisputed evidence of record is that the union campaign was conducted in secret. The ALJ ignores all of this direct evidence, and discredits all of the uniform denials of knowledge, on the basis of circumstantial evidence – deductions based on the direct evidence. Examination of that evidence, however, shows that the deductions are neither logical nor warranted.

a. Ms. Kirk

The clear evidence of record in this case is that Food City did not know anything about Ms. Kirk's protected conduct. Ms. Kirk admitted that she had been secretive about her union involvement. (Tr. 127). She testified that she signed a union card while employed with the Lawrence County Extension Office, (Tr. 95), not while fulltime with Food City. She also conceded that she had already been laid off when she attended meetings related to the union.

(Tr. 128). She admitted that the union had not conducted any open meetings, or passed out any literature at the store. (Tr. 130). Ms. Kirk also testified that she spoke with Mr. Baldridge *generally* about the union, but that it was in the summer or early fall of 2009, before she resigned her full-time employment.[44] (Tr. 102). She did not testify that she told him she was involved in the union. Consistent with her testimony, Mr. Baldridge testified that he was not aware that Ms. Kirk was involved with any union activity at any time. (Tr. 497, 520).

The ALJ concedes that there was no direct evidence that Food City was aware of Ms. Kirk's union activity. (ALJ Decision, p. 33). In order to find that the General Counsel had met its burden, however, he infers that Food City had knowledge of her protected activity based solely on a flawed statistical analysis of what he considers a high improbability that three of the four union committee members, including Ms. Kirk, were discharged. The rationale is essentially a statistical one – that, statistically, knowledge (or for that matter motivation) can be shown here by that fact. While the ALJ cites some older cases in support of that general proposition, the modern law of statistical proof of discrimination, arising notably in the areas of race, national origin, and gender discrimination, show these numbers to be meaningless.

Since *Hazelwood School District v. US*, 433 US 299 (1977), the use of statistical evidence to prove discrimination has been accepted, but only if the rules of statistical science applicable to the data show discrimination. In the post-*Hazelwood* statistical jurisprudence, statistical proof not meeting those rules is excluded. The proof here falls well short of the standard. First is the problem of sample size. A sample must be large enough for a statistical analysis to be significant. *See Stuart v. Potter*, 276 F.3d 1118 (9th Cir. 2002); *Mims v. City of St. Paul*, 224 F.2d 735 (8th Cir. 2008); and *Vigut v. Multistate Tax Commis'n*, 88 F.3d 306 (7th Cir.

[44] Mr. Burns, the union organizer, testified that the union was not communicating with any employee at Food City until January, 2010, and house visits started in August, 2010. (Tr. 45, 48).

1996). Here, the ALJ considered three events -- two discharges from the same occurrence and a layoff of a temporary employee who worked one 8 hour shift a month. Such a sample size is wholly inadequate.

Further, there was no statistical analysis. There was no consideration of other factors (like the fact that no other employees left their workplace while on the clock), by regressive analysis or otherwise. There was no consideration of the amount of deviation between expected and actual occurrences (the degree of disparity).

In order for statistics to have probative value so that an inference of discriminatory motive or knowledge can be drawn from them, there must be a reasonably high level of statistical probability that the disparity between the actual occurrences and that outcome expected, is due to the fact sought to be proved. That determination is not one of simple gut reaction, but of scientific calculation in terms of standard deviations. Generally, two or three standard deviations are required. *See Hazelwood, supra.*, 433 US 308-311. In the absence of that deviation, the statistics are meaningless. Often an expert is needed to establish the disparity. *See Williams v. Grberonics, Inc.* 871 F.2d 452 (4th Cir. 1989). No such calculation was or could be made on this record. In short, this statistical conclusion comes not from a scientific analysis, under proper rules applied to scientifically selected data, selected to determine if that data reliably proves discrimination. Rather, it is an incompetent visceral response to raw data. As the circumstantial evidence upon which the ALJ relied to find knowledge on Food City's part was and is incompetent to do so, it must be rejected. Food City's exceptions should be sustained.

b. Ms. Burton

Food City was likewise unaware of Ms. Burton's involvement in the union organizing campaign. Ms. Burton testified that, sometime in 2009, she was called upstairs to meet with Mr.

Baldridge concerning the union.[45] (Tr. 360). Mr. Baldridge and Ms. Gowen, both present during the meeting, testified to the contrary and asserted that there was no discussion of the union. (Tr. 491-92, 692). Ms. Burton admitted that no one in management knew that she had signed a union card. (Tr. 419). She likewise admitted that no one in management knew that she had meetings with the union at local restaurants or employees' homes, or that she had delivered a list of names and addresses to the union. (Tr. 419-20). Mr. Baldridge testified that he did not have any reason to believe that Ms. Burton had any relationship to the Union or to the organizing drive. (Tr. 601).

According to the ALJ, Food City had knowledge of Burton's protected conduct because: (1) Vaughn learned in September 2010 that a union campaign was underway; (2) Baldridge learned in 2009 that Burton had talked about unionization with co-workers and then he met with her about it; (3) Food City kept a document in Burton's personnel file memorializing the pro-union statements of her husband. (ALJ Decision, p. 22). There is no question that in September 2010, Food City was aware that a union campaign was underway. What is relevant to the inquiry, however, is whether Food City knew of Burton's involvement in the campaign—and the evidence demonstrates conclusively that it did not. There is no testimony by any witness, including Ms. Burton, that Food City was aware of her involvement in the campaign. Mr. Burns, the union organizer, testified that he did not inform anyone in management that an organizing drive was occurring. (Tr. 482-83). He further conceded that the union maintains a policy of secrecy regarding the identifies of individuals who sign authorization cards. (Tr. 483-84).

In an attempt to prove Food City's knowledge, the ALJ erroneously relies on two pieces of evidence, both of which are ancient and neither of which shows Ms. Burton's union

[45] Ms. Kirk and Ms. Smith testified that Ms. Burton told them that this meeting was about the union, but that Ms. Burton did not want to discuss any details. This is hearsay evidence, and is inadmissible. (Tr. 103, 184).

involvement in 2010, when the organizing drive began. For example, there is disputed testimony concerning what was discussed at the 2009 meeting, an entire year before the union campaign was underway. The ALJ chooses to believe the testimony of Ms. Burton, who testified that the union was discussed, over two other witnesses, who consistently and credibly testified that the union was not discussed. His basis for doing so is the use of hearsay statements wherein she allegedly told Ms. Smith and Ms. Kirk that the meeting was about the union. These statements are inadmissible for this purpose, and cannot be relied upon.

In addition, the ALJ's reliance on an email from Ms. Burton's husband in 2004 is erroneous. (GC Ex. 13). Food City objected to the email's admission as irrelevant, and the ALJ accepted it into evidence over objection, as he said "for what it's worth." (Tr. 306). The General Counsel conceded it was "remote in time." (Tr. 305). Mr. Burton was not called to testify by the General Counsel, and Ms. Burton did not testify that she shared the views of her husband at the time of his email. The email, at the time of the organizing drive, was 6 years old. There was no evidence that any employee of Food City was aware of this email, other than Donnie Meadows, and there was no evidence that he discussed it with any Food City employee or considered it in any of his decision-making. The mere fact that it was retained in her personnel file cannot be considered evidence of Food City's knowledge of Ms. Burton's involvement in the organizing drive in 2010.

c. Ms. Smith

Finally, there is no evidence that Food City was aware that Ms. Smith was involved in the union organizing campaign. Ms. Smith testified that she had not told anyone in management that she signed a union card. (Tr. 236). Ms. Smith also testified that she did not tell anyone in

management that she gave Daniel Cole a DVD concerning the union, or that management knew that she was attending union meetings at employees' homes. (Tr. 237).

According to the ALJ, Food City had knowledge of Smith's protected conduct because "the record shows that the Respondent was aware, at a minimum, of Smith's comments to Cecil regarding the superior wages at a unionized competitor and the connection between the Respondent's decision to increase supervision and its opposition to the union campaign. Moreover, Smith's comments to Cecil were tantamount to a declaration of support for the union campaign and were, I have no doubt, understood by Cecil as such." (ALJ Decision, p. 31). Again, the ALJ misread the evidence to meet the conclusion he wishes to reach. The testimony of the two witnesses involved in this exchange, Ms. Smith and Mr. Cecil, demonstrates the flaw in the ALJ's logic. Cecil testified that he wanted employees to ask questions—in fact, that was exactly why he was present—and Smith testified that Cecil asked for questions, and he was not upset with her for asking questions. Now, the ALJ wants to use Smith's question as evidence that Food City was aware of Smith's involvement in the union organizing campaign, going so far as to guess what Cecil's understanding was of this conversation. The ALJ bases his finding on his own speculation and conjecture which, of course is impermissible. The evidence of record simply does not support his finding.

d. Tommy Bush

Especially unfounded is the ALJ's treatment of Tommy Bush. The only real evidence in the record shows that, in July 2009, more than 14 months earlier than the actions at issue here, Tommy Bush and another employee, Brenda McKinney, told Mr. Baldridge that Ms. Burton had asked them of their interest in a union. (*See*, Tr. 490, *ll.* 14-20). The ALJ then piles upon this event a conclusion that Mr. Bush, "the same individual who reported Burton's union remarks to

Baldridge", inquired about unions of Kirk and Smith in 2009. (ALJ Decision, p. Decision, p. 5, *ll.* 1-2). Implicit in this finding is the conclusion that Mr. Bush informed management of later union activity. That implication is made clear in the ALJ's specific finding of knowledge at Decision, p. 22, *ll.* 43-50.

That conclusion is simply unfounded. The sole supervisor to whom the General Counsel argued Bush had provided such information, Mr. Garrett, denied generally any knowledge of who was active with the union and specifically denied that Mr. Bush had provided him any information of protected activity. (Tr. 471, *l.* 18 thru 477, *l.* 12). There is simply no basis upon which to conclude that Mr. Bush reported such information. Moreover, the issue was neither alleged nor tried. The complaint does not allege Bush to be an agent of Food City. Neither side called Mr. Bush because neither claimed or believed his conduct relevant. The General Counsel's brief to the ALJ does not argue Mr. Bush provided such information.

In sum, the plain evidence of record is that Food City simply did not know of any concerted activities on the part of the alleged discriminatees. Under such circumstances, the ALJ's finding that Food City had knowledge of the alleged discriminatee's protected activity is erroneous. Because the General Counsel failed to meet a critical element of its initial burden, the inquiry properly ends at that point.

2. Food City excepts to the ALJ's finding that Food City had union animus

a. The ALJ improperly engaged in circular reasoning on the issue of union animus

Union animus is a critical component of the *prima facie* case. In order to show that the employer was motivated by the employee's protected conduct, the General Counsel must show that the employer had union animus. Here, in finding that Food City had union animus, and then subsequently determining that Food City committed unfair labor practices by terminating the

alleged discriminatees, the ALJ improperly relied on circular reasoning. Specifically, the ALJ determined that Food City had union animus, in large part, ***because*** it disciplined Burton on October 23rd and then subsequently terminated the alleged discriminatees. (ALJ Decision, p. 23-24). Then, the ALJ concluded that the October 23rd discipline and the terminations were unlawful ***because*** of Food City's union animus. Thus, the ALJ's rationale is: (a) Food City had union animus because it disciplined Burton on October 23rd and terminated the alleged discriminatees and (b) Food City unlawfully disciplined Burton on October 23rd and terminated the alleged discriminatees because it had union animus. This is textbook circular reasoning and is an improper basis upon which to base a decision.

The October 23rd discipline of Ms. Burton does not otherwise constitute evidence of union animus for an additional reason -- other employees were also disciplined for not clocking out while in the break room. These employees were not supporters of the union. Moreover, the policy in question had been in place for a long time and was well-known to employees. Thus, the ALJ erred in finding that the October 23rd discipline of Ms. Burton itself constituted evidence of union animus.

b. Food City's increased supervision of the Louisa store does not constitute evidence of union animus

As with other areas of his decision, the ALJ simply states that he "infers" that the union organizing campaign was the reason Food City increased supervision at the Louisa store because there is no other "plausible explanation." (ALJ Decision, p. 10). Interestingly, the ALJ does not address the substantial evidence of business justification that Food City presented on this issue.

Increased supervision for legitimate business interests is perfectly lawful under the Act. "As a general rule, an employer may lawfully engage in surveillance of its employees at their work stations. Working time is for work, and the employer has the right to observe their work or

to determine whether they are performing that work." *New Process Company*, 290 NLRB 704, 717 (1988). Of course, an employer cannot engage in surveillance for unlawful reasons, such as reprisal for union activities. *Id.*

Even if increased supervision coincides with union organizing activity, it does not violate the Act if it is instituted for and justified by legitimate concerns for security, product integrity, or quality control. *See Lechmere, Inc.*, 295 NLRB 92 (1989) (installation of rooftop security camera on retail store did not violate the Act, even though protected activity was recorded, where general security purposes justified its presence), *enforced* 914 F.2d 313 (1st Cir. 1990), *reversed on other grounds*, 502 U.S. 527 (1992).

Here, of course, there is no question that business justifications – high shrink levels – required an increase in supervision at the Louisa store. Food City identified the store as a high priority shrink location in June 2010, before any union organizing activity. (Tr. 798, 814). And, the problem continued to get worse during the year. (Tr. 855). As a result, Food City took several initiatives in order to reduce shrink, including assigning a specific corporate security employee to monitor the store's shrink and forming a committee of local employees to analyze possible preventive measures. (Tr. 854-855). As part of the initiatives to reduce shrink, various managers, including Jamie Vaughn and Debbie Chapman, increased their presence at the store. Mr. Vaughn provided weekly shrink reports, and discussed these reports with store management. (Tr. 798).

In addition, management was present at the store due to meetings held in response to Food City's knowledge of the union organizing drive. There is no dispute that management held several meetings to discuss the union and no one has ever contested the legality of these meetings. Thus, they do not factor into this particular issue. Under the circumstances of this

case, the increase in supervision was certainly justified for business reasons and, therefore, does not constitute evidence of union animus. The ALJ's finding otherwise must be overturned.

c. The ALJ improperly cited Food City's lawful communications with employees as evidence of union animus in violation of 8(c)

The ALJ relied on certain of Food City's communications with employees to support a finding of union animus. According to the ALJ, Food City's written statements in paycheck notices and in the employee handbook that it believed the union to be unnecessary constituted evidence of union animus. (ALJ Decision, p. 23).

The mere fact that Food City distributed literature to employees does not constitute evidence of union animus. Employers are free to express their views to employees through literature, so long as their communications are not used for an improper purpose. Indeed, the Act specifically provides that:

> [t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, ***shall not constitute or be evidence of an unfair labor practice*** under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c) (emphasis added). *See also NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) ("an employer is free to communicate to his employee any of his general views about unionism or any of this specific views about a particular union, so long as the communications do not contain a threat of reprisal or force of promise of benefit"); *Virginia Concrete Corporation, Inc.*, 338 NLRB 1182, 1187 (2003) (finding that "Vote No" text message did not violate the Act).

Here, Food City did not distribute literature for any improper purpose. It did not threaten employees, solicit grievances, or offer promises to employees. ***Indeed, no such conduct has ever even been alleged in this case.*** Food City simply distributed the literature and held the

meetings to explain the law, and to explain to employees their rights and choices. Food City was well within its rights to do so. Thus, the meetings cannot be used to show discriminatory intent or union animus on the part of Food City. Consequently, the ALJ erred in finding that the meetings and literature constituted evidence of union animus.

d. Burton's meeting with Baldridge is not evidence of union animus

Contrary to the ALJ's finding, Burton's meeting with Baldrige ***before any active union organizing efforts*** does not constitute evidence of union animus. An employer is certainly entitled to meet with its employees. Even mass meetings held ***during union organizing*** are lawful. *Squire Shops, Inc.*, 218 NLRB 158 (1975). Moreover, there is no evidence (or even allegation) in this case that Baldridge unlawfully interrogated Burton during the meeting, and in fact, the evidence is in dispute as to whether the union was even discussed. Thus, it defies logic that the ALJ could determine that Food City had union animus regarding its perfectly lawful activities.

e. Food City's maintenance of an email exchange in Burton's personnel file is not evidence of union animus

A common theme in the ALJ's Recommended Decision seems to be that Food City is guilty of unfair labor practices simply because it lawfully ran its business in accordance with its policies and the rights granted to it under the law. Incredibly, the ALJ finds that Food City's maintenance of an email exchange between Burton's spouse and Meadows is evidence of union animus. In fact, this is not evidence of anything other than the ALJ's guessing why Food City would maintain a document in an employee's personnel file. Conjecture and speculation is not enough to establish union animus. *Neptco, Inc.*, 346 NLRB 18, 19 (2005). The ALJ states that "the Respondent has offered no explanation for keeping this document in Burton's personnel file." First, this statement mistakenly places a burden on Food City regarding union animus. It

is the General Counsel's burden to prove that Food City acted with union animus, not Food City's burden to prove that it acted without animus. *Texas Dental Association*, 354 NLRB at n. 3.

Second, there is no evidence of record that Food City had any motivation whatsoever regarding its maintenance of the email exchange in Burton's personnel file. Moreover, there is no law that governs how employers must maintain personnel files. Indeed, there is no law that states that employers must maintain personnel files in the first place. Thus, Food City's maintenance of the email exchange in Burton's personnel file is not evidence of anything and the ALJ erroneously relied on it in determining that Food City acted with union animus.

f. The ALJ disregarded Food City's argument that it could not have been motivated by union animus because the organizing drive had stalled

In a footnote to the Recommended Decision, the ALJ summarily dispenses with Food City's argument that it could not have been motivated by union animus because the union organizing activity had already stalled. According to the ALJ, Food City did not demonstrate that union activity had stalled by the time it took adverse employment actions against the alleged discriminatees. Food City excepts to this finding. The undisputed evidence of record is that, by the time of the layoff and discharges in question, the union's organizing efforts had stalled. By October, the union's ability to get signed authorization cards had waned. (Resp. Ex. 31). Thus, there was no active organizing drive to disrupt at the time of the challenged actions.

According to the ALJ, however, "even if the Respondent had demonstrated that it believed the union campaign was over at the time it acted, that would not mean it did not discriminate in order to retaliate and reduce the likelihood of future unionization efforts." While this may be true as a general proposition, there is no evidence of such motivation here.

Moreover, the case cited by the ALJ, *Miami Coca-Cola Bottling Co.*, 140 NLRB 1359, 1368 (1963), *enfd. in part*, 341 F.2d 524 (5th Cir. 1965), is nothing like the present case. In that case, there was evidence that management officials were instructed to "clean house" of union supporters, that a manager told an employee "your leader is fired," and that another manager told an employee that he had fired an employee "because he had been a weak spot and head of the Union at that time." *Id.* at 1368-69.

In contrast, in the present case, there is no evidence of any such explicit statements evidencing anti-union sentiment. An employer cannot have a motive to deter union activity by disciplining an employee ***after union activity has subsided*** and there is otherwise no evidence of union animus. The ALJ ignored the legal authority cited by Food City, including *Neptco, Inc.*, 346 NLRB 18, 20 (2005), a case much more closely akin to the present one. In *Neptco*, the ALJ held that certain discharges were motivated by union animus. *Id.* at 19. But, the Board rejected the ALJ's factual findings as "based exclusively on conjecture." *Id.* As to the timing of the discharges, the Board held that it did not constitute evidence of animus because the discharges were removed from "active" union campaigning. According to the Court, "the Union's organizing campaign was effectively over by the fall of 1999. Parnell and Tingler were not discharged until several months after the Union had ceased actively campaigning at the Respondent's facility. Thus, we find nothing about the timing of the discharges that suggests the Respondent was motivated by union animus." *Id.*

As in *Neptco*, the layoff and discharges in this case occurred after ***active*** union organizing efforts. Thus, their timing does not support an inference of union animus. While the General Counsel "may rely on circumstantial evidence from which an inference of discriminatory motive can be drawn, the totality of circumstances must show more than a 'mere suspicion' that

protected activity was a motivating factor in the decision." *International Computaprint Corp.*, 261 NLRB 1106 (1982).

Likewise, in the present case, there is no evidence that Food City had any union animus. The ALJ's decision relies purely on suspicion, surmise, and conjecture. Because there is no evidence of union animus in this case, the ALJ's ultimate determination that Food City committed various unfair labor practices is inherently flawed.

C. Food City would have taken the same actions even in the absence of protected conduct

Even if the General Counsel shows that protected activity was a motivating factor in a discharge, an employer is nevertheless absolved of liability where it can show that it would have taken the same action even in the absence of protected activity. The reason need not be a particularly good one, so long as the reason was not the employee's protected activity. *See, e.g., Yuker Construction*, 335 NLRB 1072 (2001) (discharge based on mistaken belief does not constitute an unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity).

Of course, the employer can more easily meet its burden of proof where the employee has incurred a clear violation of the employer's policies. For example, in *Consol. Biscuit Co.*, 346 NLRB 1175, 1178 (2006), the Board held that the respondent employer demonstrated that it would have terminated an employee, even in the absence of protected activity, where the employee clearly violated the employer's policy. According to the Board, the employee's "failure to report to work or call in for well beyond 3 successive workdays is more than sufficient to warrant termination under the Respondent's policy." *Id.*

Moreover, the Board is not permitted to substitute its business judgment for that of the employer. *See, e.g., Detroit Paneling Systems*, 330 NLRB 1170, 1171 (2000); *Douglas Aircraft*

Co., 308 NLRB 1217, 1224 (1992). According to the Board, "an employer's business conduct is not to be judged by any standard other than that which it has set for itself." *FPC Advertising, Inc.*, 231 NLRB 1135 (1977). The Board cannot function as a "ubiquitous personnel manager" and in fact, "[i]t is well recognized that an employer is free to lawfully run its business as it pleases." *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 310 (D.C. Cir. 2006) (*quoting Epilepsy Found. of Ne. Oh. v. NLRB*, 268 F.3d 1095, 1105 (D.C. Cir. 2001)).

See also, *Columbian Distribution Services, Inc.*, 320 NLRB 1068, 1070 (1996), (*citing FPC Advertising*, 231 NLRB 1135, 1136 (1977)) and *Crescendo Broadcasting, Inc.*, 217 NLRB 697 (1975), where the Board held that the Administrative Law Judge "erroneously substituted his own business judgment for that of Respondent in concluded that it could not operate its radio station in compliance with FCC regulations with only one first-class operator."

This business judgment rule applies with equal force in discharge situations. *Thurston Motor Lines, Inc.*, 149 NLRB 1368 (1964). For instance, in *Summitville Tile, Inc.*, 245 NLRB 863 n. 1 (1979), the Board stated:

> We do not adopt the conclusion of the Administrative Law Judge that the termination of the employees was the less effective alternative available to Respondent to deal with the card playing by the night shift. We will not substitute our judgment for the business judgment of the Respondent by concluding, as the Administrative Law Judge did, that the 'quickest, easiest, and least painful way of getting the night shift to stop quitting early and playing cards on Company time was simply to tell them to stop doing it.' ***The Board will not instruct employers as to what is the best way to deal with serious breaches of discipline.***

(*Id*). (Emphasis added). Here, as set forth below, Food City had legitimate business reasons for its actions and the evidence of record is that Food City would have taken the same actions even in the absence of discriminatory intent.

1. Discipline of Burton on October 23

The ALJ rejects Food City's argument that it would have disciplined Burton on October 23rd for being in the break room while on the clock, even in the absence of her protected conduct. Food City employees are entitled to two 15 minute breaks during a shift. (Tr. 232). Ms. Burton was disciplined only after Mr. Garrett determined that, after his first seeing her in the break room away from her job while on the clock, and counseling her that this was a violation of company policy, she then disregarded his directive and was back in the break room while on the clock minutes later, which was witnessed by his supervisor, Jamie Vaughn. Contrary to the picture the ALJ creates, this is very different from simply stopping in the break room for a few minutes to say hello to another co-worker. Yet, the ALJ believes that, despite Ms. Burton's clear violation of company policy, Food City's action in disciplining her is a violation of the Act.

According to the ALJ, Food City did not produce any evidence that employees had previously been disciplined for similar incidents. (ALJ Decision, p. 24). This reasoning is flawed for several reasons. First, the ALJ simply ignores the fact that, at the time of Burton's break room violation, there was a well-known policy in place prohibiting such conduct. Even assuming that Food City decided to more strictly enforce its existing policy, this legitimate business action is not illegal. There is no evidence of record that anyone in management was aware that employees were discussing union organizing activity in the break room, and therefore more strictly enforcing an existing policy that has nothing to do with prohibiting union organizing is permitted by law.

Second, other employees were disciplined after Ms. Burton. While the ALJ takes issue with these disciplines, and deems them to have simply happened to make Ms. Burton's discipline appear "fair," these employees were disciplined consistently after violating company policy, and

were not supporters of the union. Thus, it is clear that Food City would have disciplined Ms. Burton for her violation of the break room policy even in the absence of her protected conduct. Consequently, the ALJ's finding of a violation of the Act must be overturned.

2. Discipline of Branham and Sweeney

Moreover, Food City consistently disciplined two other employees, Richard Branham and Daryl Sweeney, for being in the break room while on the clock. (Tr. 726). Neither were supporters of the union. Consequently, the ALJ's decision to the contrary must be overturned.

3. Posting of Signs Reminding Employees of Existing Policies

The ALJ held that Food City violated the Act when it posted a sign reminding employees of the policy that they are not permitted in the break room while on-the-clock. (Complaint, ¶¶ 5(a), 5(b), 5(c), 9, 10, 11). There was nothing unlawful about Food City's conduct in this regard. First, an employer is permitted to enforce and/or utilize its past policies during a union organizing campaign. *House of Raeford Farms*, 308 NLRB 568, 569 (1992) (employer's continued use of open door policy permissible during union organizing).

Moreover, the Board has long recognized that "working time is for work," but that time outside of working hours "is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property." *Peyton Packing Co.*, 49 NLRB 828, 843 (1949). Indeed, even rules prohibiting solicitation during "working time" are perfectly valid because they imply that solicitation is permitted during non-working time (i.e., while employees are actually on breaks). *Essex Int'l*, 211 NLRB 749 (1974) (holding that rules banning solicitation during "working time" are presumptively valid).

Here, Food City was simply enforcing its ***existing*** policy that the break room was for employees on breaks, not for working employee. This common sense policy was well-known to employees. According to Ms. Smith:

> Q: Do you-you know what the policy is with respect to breaks, don't you?
>
> A: Yeah, you get two 15-minute breaks if you're there an eight-hour shift.
>
> Q: And you're supposed to go to the clock and clock out with – I mean, clock out break; right?
>
> A: Correct.
>
> ...
>
> Q: And that's been the policy all the time you've been there[?]
>
> A: yes.

(Tr. 232).

This was not a new policy. It is simply common sense. It had no connection to the Union. There is no evidence that enforcement of Food City's rule restricted union communications in any way. Under these circumstances, Food City was well within its rights to enforce this existing rule and the ALJ's decision that this was an unfair labor practice must be overturned.

4. Food City's Assignment of New Duties to Burton

The undisputed evidence in this case is that Food City had good business reasons for assigning Burton the duty of working warehouse cakes, and that it would have taken this same action even in the absence of protected conduct. Nevertheless, the ALJ determined that Food City committed an unfair labor practice when it assigned Burton this duty. (ALJ Decision, pp. 26-27). This finding is erroneous.

Even where there is union organizing occurring, an employer does not have to cease running its business as it normally would. As set forth in the legal authority cited above, neither the ALJ nor the Board may permissibly substitute their business judgment for Food City's. The ALJ states that Food City has failed to explain why it assigned Burton the additional duty of working warehouse cakes. In fact, there is clear and consistent evidence of record as to why this change was made.

Mr. Baldridge and Mr. Garrett, both members of management, had previously worked warehouse cakes, but they were told by their supervisor, Mr. Vaughn, to no longer do so as their time should be spent on management duties.[46] (Tr. 551-52, 786-77). Thus, they assigned the task to the receiver, Ms. Burton, at the Louisa store in or about November 2010. It is common company-wide for the receiver to be assigned this task.[47] In fact, Ms. Burton did not indicate that she had any problem with acquiring this additional job duty, stating "okay, that's fine." (Tr. 378). Moreover, this duty was nothing new for Ms. Burton – she had previously performed it for over a year and was well aware of its requirements. (Tr. 379-80). At no time did she tell Mr. Baldridge, or anyone in management, that she did not have time to perform this duty. (Tr. 555).

In support of his decision, the ALJ states that Mr. Baldridge and Mr. Vaughn provided inconsistent reasons for assigning the warehouse cakes task to Ms. Burton:

> Vaughn and Baldridge gave inconsistent explanations for their selection of Burton for the pies and cakes assignment. Vaughn claimed that he asked Baldridge to assign the work to Burton because the receivers at other stores did the assignment and it "works out pretty good." Tr. 787. Baldridge, however, attributed the decision to the fact that Burton had past experience with the assignment, and the view that Burton "had the time to do it along with her receiver duties. Tr. 553.

[46] The assistant manager is responsible for ensuring that the warehouse cakes get completed. They are authorized to assign this task to employees. (GC Ex. 21; Tr. 833).

[47] For example, the receiver works warehouse cakes at the Williamson, Kentucky store. (Tr. 716). Three stores in Mr. Vaughn's district assigns warehouse cakes to the receiver. (Tr. 831).

(ALJ Decision, p. 14). These reasons are not inconsistent at all. Just because there were multiple reasons why it made sense to assign the duty to Ms. Burton does not make those reasons inconsistent. This is yet another example of the ALJ relying on faulty logic to explain his decision. The record in this case demonstrates that Food City had perfectly legitimate reasons for assigning Ms. Burton the task of working warehouse cake and it is clear that Food City would have taken this same action even in the absence of protected conduct. Thus, the ALJ's decision on this issue should be overturned.

5. Food City's Discipline of Burton for Tardiness

Food City had a legitimate business reason for disciplining Burton due to tardiness – this was a clear-cut violation of policy. Nevertheless, the ALJ determined that Food City committed an unfair labor practice by enforcing its policy because, according to him, Food City presented no evidence during the hearing that other employees had been disciplined in the past under this policy. (ALJ Decision, p. 27). The ALJ ignores several important facts in reaching this conclusion.

First, he ignores the plain evidence of record that the tardiness policy was long-standing. Moreover, Ms. Burton admitted that she violated that policy. (Tr. 398). In addition, while Ms. Burton may not have been disciplined before, she conceded she was late. (*Id.*). Thus, the record is clear that Ms. Burton would have been disciplined for tardiness even in the absence of any protected activity on her part.

Second, another employee, Richard Branham, was disciplined for tardiness. The ALJ attempts to distinguish this employee's conduct by arguing that he was 2 hours late, and this is a more serious violation, and therefore any action against Burton for what he considers a lesser violation was illegal. Again, the ALJ overreaches and acts as a personnel department in deciding

which violation is "more serious," and therefore which violation is "more appropriate" for discipline. This is improper and cannot be permitted.

6. Food City's Discipline of Smith for Failure to Attend a Mandatory Meeting

The ALJ rejects Food City's reason for the discipline of Ms. Smith for failure to attend a mandatory meeting. In finding that Food City singled out Ms. Smith for discipline, the ALJ disregards the fact that Ms. Smith was the only employee that did not contact a manager and request the time off. Food City agrees that other employees did not attend the meeting. The critical difference between those employees who missed the meeting and Ms. Smith is that they discussed their absences with a manager PRIOR to the meeting. Ms. Smith, in fact, testified that she had planned to attend the meeting, had simply forgotten about it, and knew that it was a violation of company policy to miss the meeting and not call in. There was no testimony that this situation occurred with any other employee. The ALJ notes that Ms. Smith was a 10 year employee of the store that had not been previously disciplined. Again, the ALJ seems to indicate that Food City should have "forgiven" this violation of company policy, and not disciplined Smith for an admitted violation. This is not required by the law.

7. Ms. Kirk's layoff

Here, legitimate business reasons for Food City's actions are clear. Ms. Kirk was working in a temporary position before the Company laid her off. She had initially quit to pursue another full-time job, but agreed to stay with Food City part-time to train her replacement. (Tr. 72, 628-29). Moreover, she is the one who eventually requested to work only one day per month. (Tr. 74). She knew full well that her position was temporary in nature, testifying that she was not for sure how long her help would be needed. (Tr. 123). Thus, it would have come to no surprise to Ms. Kirk when Food City laid her off on October 16, 2010, in

order to hire a back-up scanning deputy who was available to work the hours required by the position.

It appears that the ALJ does not reject the business reason, but simply finds the timing of the reason to be illegal. His flawed reasoning is based on the fact that a back up training deputy had not yet been fully trained. Yet, this cannot be the basis on which to reject Food City's legitimate business decision. What is actually apparent is that Ms. Kirk was not necessary for any training. Ms. Smith testified that Lee Maggard had already been performing the position with her supervision. She requested additional help, and suggested Mr. Maggard. At the time of Ms. Kirk's layoff, Mr. Baldridge announced that Mr. Maggard would be performing the job, and a week later, Ms. Smith spent a few days training him. (Tr. 109). Ms. Kirk only worked one day a month. By the time she was scheduled to work again, Mr. Maggard was fully trained. Working the next month would not have made a significant difference in either providing back-up, or training the new back-up scanning deputy. The ALJ's finding, therefore, that Ms. Kirk was required to stay on until Mr. Maggard was trained is specious. The clear evidence of record demonstrates that this was not only a legitimate business decision on Food City's part, but a sensible one as well. Therefore, Food City did not commit an unfair labor practice in laying off Ms. Kirk.

8. The terminations of Burton and Smith

An employer has the right to discharge an employee for any reason or for no reason, so long as the discharge is not in reprisal for union activities. *NLRB v. Sawyer Downtown Motors, Inc.*, 231 F.2d 514, 516 (7th Cir. 1954). According to the Board, "[a]bsent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws." *Neptco, Inc.*, 346 NLRB No. 6, slip op.

at 2 (2005). Thus, the act of discharging employees during or close in time to union organizing efforts is not itself unlawful.

In this case, Glenda Burton and Martha Smith were terminated in November 2010 because they clearly violated store policy by being away from their work areas and, indeed, outside of the store for approximately eight minutes on the clock. Both Ms. Burton and Ms. Smith have admitted this policy violation. (Tr. 248-49, 437, 440).

Ms. Burton had received ample warning. In late October 2010, management officials caught Ms. Burton on multiple occasions away from work while on the clock. (Tr. 722, 777-78, 817). She received a verbal correction as a result of her conduct, which clearly violated Food City's policy prohibiting being in the break room while on the clock. (Tr. 723). On November 4, 2010, Food City issued Ms. Burton a written correction for arriving late for her shift. (GC Ex. 16). Ms. Burton admitted this policy violation. (Tr. 398). Then, on November 12, 2010, Mr. Baldridge issued a final written correction to Ms. Burton for insubordination in scanning unauthorized product – orange cupcakes – into the store after being told not to do so. (GC Ex. 10(b)). Ms. Burton plainly admits that she violated Food City's policy regarding unauthorized products. (Tr. 431). This incident alone could justify termination, but instead, Food City decided to make it a final warning.

Despite all of her clear policy violations, which she admitted, and on a final warning, Ms. Burton proceeded to violate several additional policies which directly led to her termination. Specifically, on November 19, 2010, Mr. Vaughn found outdated snack cakes on the store shelves. (Tr. 788). It was Ms. Burton's responsibility to remove this, but she had not, even though she had worked the day before and was at work on the 19th. Then, after management officials reviewed the CCTV feed of the receiving area (due to Ms. Kirk, who no longer worked

for the store, being spotted in the area), they observed Ms. Burton and Ms. Smith in the receiving area. (Tr. 567, 794). They were taking soda crates out the back door. (Tr. 569). After they exited the door, the door remained opened, with the alarm disengaged and the receiving area unmonitored, for eight minutes. (Tr. 795). This, of course, was a serious policy violation. In addition, Ms. Burton violated the policy of not working while on the clock. (Tr. 437). In addition, a vendor was left waiting in the receiving area, which is also a policy violation. (Position Description). Finally, Ms. Burton also violated company policy by bringing in a package through the back door. (Tr. 252, 796). Based on the seriousness of her violations, none of which she denied, her prior disciplinary actions, including a final warning, and her repeated issues with the cakes, Mr. Baldridge, accompanied by Mr. Vaughn, terminated Ms. Burton. (Tr. 585).

Ms. Burton's and Ms. Smith's situations cannot meaningfully be compared to anyone else's. There is no evidence of record of any other employee engaging in the seriousness of the company violations on November 19 nor the ***totality of conduct*** that Ms. Burton and Ms. Smith engaged in, as set forth in detail above. Food City has clear-cut policies and Ms. Burton and Ms. Smith broke them.

It is not the Board's decision as to whether these were permissible grounds for termination. These were clear policy violations. And, even if Food City had been mistaken in its belief regarding Ms. Burton's and Ms. Smith's conduct, it would nevertheless be permitted to discipline them, so long as its belief was genuine. But, this is not a case of mistaken belief. Both Ms. Burton and Ms. Smith have admitted their serious policy violations. Therefore, there can be no disputing the fact that Food City was well within its rights to exercise its business judgment in terminating these two employees. The Board cannot substitute its judgment for that of Food

City, even if it believes the punishment was too harsh or not entirely warranted under the circumstances.

In sum, the clear evidence of record is that, even if there was protected activity on the part of the alleged discriminatees, of which Food City was aware, the Company would have taken the same actions against the alleged discriminatees. Ms. Kirk would have been laid off anyway because her position was only temporary. And, Ms. Burton and Ms. Smith would have been terminated for their clear violations of Company policy. Under these circumstances, Food City did not commit any unfair labor practices.

IV. Conclusion

As set forth above, the ALJ's decision in this case is at odds with the clear evidence of record and in contravention of the law. Therefore, Food City asks the Board to overturn the ALJ's decision that Food City violated Sections 8(a)(1) and 8(a)(3) or, at the very least, to give full effect to the settlement agreements entered into between Food City and the alleged discriminatees.

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the matter of

K-VA-T FOOD STORES, INC.
D/B/A FOOD CITY

and **Case 9-CA-46125**
9-CA-46126
9-CA-46127
RETAIL, WHOLESALE & DEPARTMENT **9-CA-46152**
STORE UNION, UFCW, CLC **9-CA-46153**

CERTIFICATE OF SERVICE

I, Ashley C. Pack, counsel for K-VA-T Food Stores, Inc. d/b/a Food City, do hereby certify that the foregoing **Brief of K-VA-T Food Stores, Inc. d/b/a Food City in Support of its Exceptions to the Decision of the Administrative Law Judge** was filed via the National Labor Relations Board's electronic filing system on the following this 24th day of August, 2011:

Lester A. Heltzer, Executive Secretary
Board's Office of the Executive Secretary
1099 14th Street N.W.
Washington, DC 20570

and that true and exact copies of the same were served on the following via electronic mail this the 24th day of August, 2011:

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